NO. SC85648

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. LEE S. FRANCIS

Relator,

v.

HONORABLE WARREN E. McELWAIN,

Circuit Judge, Forty-third Judicial Circuit

Respondent.

ORIGINAL PROCEEDING IN MANDAMUS

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Relator Lee S. Francis, an inmate in the Missouri Department of Corrections, seeks this Court's writ of mandamus to require respondent Judge Warren L. McElwain to allow him to file a petition for writ of habeas corpus without paying the required filing fee. This Court has jurisdiction to issue original writs, including writs of mandamus. Missouri Constitution, Art. V, §4 (as amended 1976). Jurisdiction therefore is proper in this Court.

STATEMENT OF FACTS

Relator Lee S. Francis was convicted in the Circuit Court of Jackson County, Missouri, case no. CR93-1990, of one count of first-degree murder and one count of armed criminal action and was sentenced to life imprisonment without the possibility of probation of parole on the murder count and a consecutive life sentence on the armed criminal action sentence. Pet. Ex. 1-C.

Relator filed a petition for writ of habeas corpus in the Circuit Court of Dekalb County, Missouri, challenging his Jackson County convictions and sentences on March 26, 2003. Pet. Ex. 2. After reviewing relator's prison inmate account, respondent Judge McElwain required relator to pay the entire filing fee under the Prisoner Litigation Reform Act, §560.360 *et seq.*, RSMo 2000, beginning with an initial payment of $17.00 and monthly payments of twenty percent of the proceeding month's income to relator's prison account. Pet. Ex. 3. Respondent judge also informed relator that upon receipt of the initial partial filing fee, the Court would take up relator's case. Resp. Ex. 3. The Office of the Missouri State Public Defender System has chosen to represent relator in his attempt to gain habeas corpus relief and filed the petition for writ of mandamus at bar in order to allow relator to file his habeas corpus petition in the circuit court without payment of the filing fee.

ARGUMENT

I. Relator Francis is not entitled to a writ of mandamus compelling Judge McElwain to allow him to proceed in relator's habeas corpus action without paying a filing fee because Missouri's Prisoner Litigation Reform Act applies to habeas corpus actions.

Relator Francis contends that respondent McElwain cannot order relator to pay a filing fee under the Prisoner Litigation Reform Act (PLRA) in habeas corpus cases where a relator is challenging the legality of his confinement.

A. Legal standard for mandamus relief

The purpose of mandamus is "to execute, not adjudicate." State ex rel. Missouri Growth Ass'n v. State Tax Comm'n, 998 S.W.2d 786, 788 (Mo. banc 1999). Mandamus is appropriate only when "there is a clear, unequivocal, right to be enforced," and is "only appropriate to require the performance of a ministerial act." Id. Therefore, in order to receive relief in this case, relator must show that he has a right to proceed in his state habeas without the payment of any filing fees. Relator cannot meet this burden.

B. The PLRA requires that a habeas relator pay court costs

Relator Francis' first ground for relief argues that the Prison Litigation Reform Act (PLRA), §506.360 *et seq.*, RSMo 2000, does not apply to habeas corpus actions. Relator goes to great lengths to show that the PLRA should

only apply to prisoner suits for damages and injunctive relief. Relator's reading of the statute is simply incorrect.

Section 506.366, RSMo 2000, states that "an offender seeking to bring a civil action or to appeal a judgment in a civil action without the prepayment of fees or security due to indigency shall submit a request to the court to proceed without the prepayment of fees." In matters of statutory interpretation, this Court has repeatedly held that "the primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning." Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 251 (Mo. banc 2003); Budding v. SSM Healthcare System, 19 S.W.3d 678, 680 (Mo. banc 2000). In its plain and ordinary meaning, §506.366 thus applies, on its face, to offenders bringing civil lawsuits. Habeas corpus proceedings are civil lawsuits. State ex rel. Nixon v. Jaynes, 63 S.W.3d 210, 216 (Mo. banc 2001); Supreme Court Rule 91.01. Relator Francis, an incarcerated offender, wishes to prosecute a petition for writ of habeas corpus, a civil lawsuit. The PLRA thus applies, on its face, to relator Francis' petition for writ of habeas corpus.

Relator alleges that certain sections of the PLRA apply only to situations where an offender is seeking monetary damages from government officials or entities. *See* Relator's Brief at 10, 12, 21. Specifically, relator cites to §506.387,

RSMo 2000, which applies to monetary damages won by offenders and §506.381, RSMo 2000, which applies to a court's screening of inmate petitions. Relator's Suggestions in Support at 4. However, these sections of the PLRA do not take away from the plain language of §506.366, RSMo 2000: "an offender seeking to bring a civil action ... shall submit a request to the court to proceed without the prepayment of fees." Although §§506.381 and 506.387 may not specifically apply to an action in habeas corpus, they do not expressly or implicitly remove habeas corpus actions from the confines of the PLRA. These sections merely deal with claims for monetary damages, an issue not raised in a habeas corpus petition.

Further, habeas corpus has a much broader reach than simply challenging a conviction and sentence. Habeas corpus is also a proper remedy for challenging conditions of confinement that rise to the level of cruel and unusual punishment, McIntosh v. Hayes, 545 S.W.2d 647, 652-53 (Mo. banc 1977), and jail time credit, State ex rel. Nixon v. Jaynes, 58 S.W.3d 513, 516 (Mo. banc 2001). If this Court were to hold that the PLRA does not apply to habeas petitions challenging a conviction and sentence, inmates may combine their challenges to the "conditions of confinement" rising to the level of "cruel and unusual punishment," terms interpreted very broadly within the prison walls, or their jail-time credit claims with challenges to their convictions and sentences in

order to take advantage of the opportunity to file without having to pay a filing fee. Inmates thus would be making an end run around the PLRA's payment requirements and would raise claims clearly under the PLRA's intended target. Taking a portion of habeas corpus out of the reach of the PLRA thus does not make good policy.

For all of the above reasons, relator's first claim thus fails.

C. Missouri law requires that all incarcerated offenders pay filing fees

Relator's first ground for relief further fails because it is contrary to the plain language of §514.041.2, RSMo 2000, which states as follows:

> **In any civil action brought in a court of this state by any offender convicted of a crime who is confined in any state prison or correctional center, the court shall not reduce the amount required as security for costs upon filing such suit to an amount of less than ten dollars pursuant to this section. This subsection shall not apply to any action for which no sum as security for costs is required to be paid upon filing such suit.**

Thus, a filing fee of at least ten dollars is required in *all* civil actions filed by offenders except those actions that do not require a sum to be paid as security for costs, such as proceedings under Rules 24.035 and 29.15. The habeas corpus statute, §532.010 *et seq.*, RSMo 2000, and Missouri Supreme Court Rule 91, governing habeas corpus, do not exempt habeas relators from paying a filing

fee. Therefore, neither the Missouri General Assembly nor this Court have expressly waived costs for the filing of a petition for habeas relief. This Court knows precisely how to exempt a case from filing fees and deposits of costs because this Court did so for post-conviction relief motions under Rules 24.035 and 29.15. *See* Rule 24.035(b); Rule 29.15(b). Therefore, neither the General Assembly by statute nor this Court by rule have excepted habeas corpus actions from the payment of filing fees. Relator's first point thus fails on this basis as well.

D. The federal PRLA and its relationship with federal habeas corpus is distinct from the Missouri PRLA and Missouri habeas corpus

1. The federal PLRA compared with Missouri's PRLA

For the purposes of this case, the federal Prisoner Litigation Reform Act ("federal PLRA") is 28 U.S.C. §1915 (2000).[1] In pertinent part, this statute states that a "prisoner seeking to bring a civil action or appeal a judgment in a

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[1]The federal PLRA was contained in Title VII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub.L. 104-134, 110 Stat. 1321 (1996). Section 804 of the federal PLRA amended 28 U.S.C. §1915. Other sections of this Act amended other federal statutes. However, those other amendments are not at issue in this case.

civil action" must provide the court with a six-month summary of his prison account, §1915(a)(2), that a prisoner must pay an initial filing fee based on his prison account balance or income, §1915(b)(1), that a prisoner must make monthly payments until the filing fee is paid in full, §1915(b)(2), that the district court should screen prisoner cases and summarily dismiss them in certain cases, §1915(e)(2), and that a prisoner may not file *in forma pauperis* if the prisoner has filed three or more prior lawsuits in federal court that were dismissed for frivolity, maliciousness, or failure to state a claim upon which relief may be granted, §1915(g).[2]

The federal PLRA is equivalent in many respects to Missouri's PLRA, For example, §1915(a)(2) is equivalent to §566.366, RSMo 2000. Section 1915(b)(1) corresponds to §506.369, §1915(b)(2) corresponds to §506.372, §1915(e)(2) corresponds to §506.381, and §1915(f)(2) corresponds to §506.378. However, the federal PLRA differs from Missouri's PLRA in that the federal PLRA includes a provision that an inmate may not proceed *in forma pauperis* after

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[2]Due to the length of 28 U.S.C. §1915, respondent does not include §1915 in the body of this response but has attached it as an appendix to this brief.

filing three or more previous lawsuits that have been dismissed for frivolity, maliciousness, or failure to state a claim upon which relief may be granted. §1915(g). Missouri law also includes a separate pauper statute, §514.040.2, RSMo 2000, which provides that in any civil action, "the court shall not reduce the amount required . . . to an amount of less than ten dollars under this section." The federal PLRA has no corresponding section, but federal law states that the filing fee for habeas corpus cases is five dollars. 28 U.S.C. §1914.

2. Federal habeas corpus compared with Missouri habeas corpus

Federal habeas corpus is defined by three statutes: 28 U.S.C. §2241, 28 U.S.C. §2254, and 28 U.S.C. §2255.[3] Of these three statutes, §2254 allows for federal court review of a state court conviction, and is not analogous to any provision of Missouri law.[4] Section 2255 is analogous to a post-conviction action under Missouri Supreme Court Rules 29.15 or 24.035 in that it allows

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[3]The full text of 28 U.S.C. §§2241, 2254, and 2255 is included as an appendix to this pleading.

[4]28 U.S.C. §2254 is not analogous to any provision of Missouri law because §2254 provides for federal review of state court convictions. Missouri has no need for such a provision.

persons convicted in federal court to challenge the constitutionality of their sentences, the jurisdiction of the court to impose sentence, that the sentence was in excess of the maximum permitted by law, or other collateral challenges.

Section 2241 is the general habeas statute, and provides for a writ in cases when a relator is in custody under the authority of the United States, §2241(c)(1), in custody for violating an act of Congress or a judgment of a federal court, §2241(c)(2), in custody in violation of the Constitution, laws, or treaties of the United States, §2241(c)(3), is a citizen of a foreign state and is in custody for the violation of a act of foreign state and the validity of the act depends on the law of nations, §2241(c)(4), and for writs of habeas corpus *ad prosequendum* and *ad testificandum*, §2241(c)(5). In comparison with Missouri law, the only one of these federal statutory bases for which Missouri law allows habeas corpus is the constitutionality of the conviction and sentence. State ex rel. Simmons v. White, 866 S.W.2d 443, 445-46 (Mo. banc 1993). The other bases, with the exception of writs to appear and testify at trial, apply to matters uniquely within the federal government's sole constitutional power.

The language in §2241(c)(3) allows for a writ to be prosecuted in cases where a relator "is in custody in violation of the Constitution or laws or treaties of the United States." Identical language is found in §2254(a) and §2255. The federal courts have resolved the question of which provision habeas actions challenging

a conviction or sentence fall under by holding that in cases where a federal writ may be prosecuted under §2241 or §2254, the writ may be prosecuted only under §2254. *See* Felker v. Turpin, 518 U.S. 651, 662, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996); Crouch v. Norris, 251 F.3d 720, 723 (8th Cir. 2001); Coady v. Vaughn, 251 F.3d 480, 484-85 (3rd Cir. 2001). In cases involving both §2241 and §2255, a relator may challenge the constitutionality his federal conviction and sentence only under §2255, but may challenge the execution of his federal sentence, including sentence calculation and jail-time credit, under §2241. Coady, *supra* (collecting cases). Therefore, in cases challenging the validity of a conviction and sentence, all federal habeas relators must file under §2254 to challenge the validity of state convictions or §2255 to challenge the validity of federal convictions.

3. Federal courts, federal habeas, and the federal PLRA

Federal courts have consistently held that federal habeas corpus petitions under §2254 and §2255 fall outside of the confines of the federal PLRA, and thus relators may be excused from paying a filing fee in its entirety upon a showing of indigency. Martin v. Bissonette,118 F.3d 871, 874 (1st Cir. 1997); Reyes v. Keane, 90 F.3d 676, 678 (2d Cir. 1996); Santana v. United States, 98 F.3d 752, 756 (3d Cir. 1996); Smith v. Angelone, 111 F.3d 1126, 1131 (4th Cir. 1997); Davis v. Fechtel, 150 F.3d 486, 488-90 (5th Cir. 1998); Kincade v.

Sparkman, 117 F.3d 949, 950-51 (6th Cir. 1997); Walker v. O'Brien, 216 F.3d 626, 633-37 (7th Cir. 2000); Naddi v. Hill, 106 F.3d 275, 277 (9th Cir. 1997); McIntosh v. United States Parole Comm'n, 115 F.3d 809, 811-12 (10th Cir. 1997); Anderson v. Singletary, 111 F.3d 801, 806 (11th Cir. 1997); Blair-Bey v. Quick, 151 F.3d 1036, 1039-41 (D.C. Cir. 1998).[5]

The federal courts came to this determination for a number of reasons. First, the federal courts have determined that subjecting habeas petitions to the three strikes provision of 28 U.S.C. §1915(g) serves a similar purpose as the strict habeas guidelines for second and successive petitions contained in 28 U.S.C. §2244(b)(2) (as relating to §2254 cases) and §2255. Walker, 216 F.3d at 637; Anderson, 111 F.3d at 805; Smith, 111 F.3d at 1131; Naddi, 106 F.3d at 277. Federal courts have demonstrated concern that §1915(g)'s "three strikes" requirement will prevent relators from filing habeas petitions. Smith, 111 F.3d at 1131. Some federal courts base their conclusion on the fact that Congress passed the federal PLRA in order to stem the tide of litigation concerning prison

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[5]Respondent clarifies that this collection of cases is from the Seventh Circuit's opinion in Walker v. O'Brien, 216 F.3d at 628-29.

conditions, not habeas. Anderson, *supra*; Santana, 98 F.3d at 755-56. Other federal courts base their conclusion on the fact that the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) , which amended §§2254 and 2255, made no mention of fees, fee structure, or the pauper statute. Kincade, 117 F.3d at 951; Smith, 111 F.3d at 1130 (collecting cases).

4. The federal courts' position with respect to the federal PLRA should not be followed under Missouri habeas corpus law

The federal court's position with respect to the federal PLRA represents the key differences between federal law and Missouri law. Federal courts, interpreting the federal PLRA, have expressed concern that 28 U.S.C. §1915(g)'s "three strikes" requirement will prevent relators from filing habeas petitions. However, Missouri law and the Missouri PLRA contain no provision similar to the "three strikes" provision of 28 U.S.C. §1915(g). Missouri law also does not contain the second or successive habeas provisions found in 28 U.S.C. §2244(b) and 28 U.S.C. §2255. Therefore, Missouri law does not contain any of the federal statutory provisions upon which the federal courts have based their decision not to subject federal habeas suits to the PLRA. In fact, under Missouri law, *res judicata* is not a defense in habeas cases. *See* State ex rel. Nixon v. Jaynes, 63 S.W.3d 210, 217 (Mo. banc 2001)("Successive habeas corpus petitions are, as such, not barred. But the opportunities for such relief are

extremely limited. A strong presumption exists, as Schlup v. Delo, [513 U.S. 298, 315, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995),] indicates, against claims that already have once been litigated.").

Second, the federal courts articulated that petitions under §§2254 and 2255 do not fall under the federal PLRA because AEDPA, enacted two days later, did not address the PLRA as applied to habeas corpus. Naddi, 106 F.3d at 277. However, this basis for the federal courts' decision rests on the federal statutes, their dates of passage, and the congressional intent for the federal PLRA. Missouri law presents a different picture. The Missouri PLRA became law on August 28, 1997. and amendments to the PLRA became law on August 28, 1999. This Court's Rule 91, governing habeas corpus, was adopted on 1982 and amended in 1993, and on October 22, 1996. The Missouri habeas structure simply does not have the same statutory history intertwined with Missouri habeas corpus as found in the federal habeas corpus system. Thus, the relationship between the federal PLRA and federal habeas rests on purely federal statutory grounds that do not exist in the Missouri habeas system. This Court thus should not follow the federal rule.

Further, federal courts based their holdings on the fact that Congress passed the federal PLRA in order to stem the tide of litigation concerning prison conditions. The federal courts based their decision on remarks of Senator

Robert Dole of Kansas. *See* Naddi, *supra*, *citing* 141 Cong.Rec. S7523-27 (daily ed. May 25, 1995); Blair-Bey, 151 F.3d at 1040. In Missouri, however, legislative history of this type does not exist. Absent a similar record for legislative history, the Missouri PLRA is not similar to the federal PLRA. Additionally, federal law already provided for safeguards against successive habeas petitions at the time that the federal PLRA was passed, thus, presumably, there was no need for additional safeguards with respect to successive habeas petitions. However, under Missouri law, there are not safeguards against repetitive habeas filings. Jaynes, 63 S.W.3d at 217. Thus, in Missouri, payment of fees may be reasonably construed as a manner, and potentially the only manner, to filter out frivolous habeas lawsuits from habeas lawsuits that may have merit. Therefore, as the federal PLRA and federal habeas are distinct from the Missouri PLRA and Missouri habeas, this Court should decline to follow the federal caselaw concerning the federal PLRA on this point.

As shown above, the reasons for the federal courts' decisions to exclude federal habeas corpus relators from the federal PLRA are based on grounds unique to the federal statutes and distinct from Missouri habeas corpus law. The theories relied on by the federal courts thus are inapplicable in Missouri courts. Therefore, this Court should determine that the Missouri PLRA applies

to petitions for habeas corpus, decline to follow the federal rule, and require relator to pay the filing fee in this action.

II. Relator Francis is not entitled to proceed *in forma pauperis* in this mandamus action because the Prisoner Litigation Reform Act applies to all civil action, a petition for writ of mandamus is a civil action, and this Court has consistently required inmate mandamus relators to comply with the Prisoner Litigation Reform Act.

This Court requested that the parties brief the issue of the applicability of the PLRA to this action. Relator has filed a motion to proceed *in forma pauperis* in this action. However, the PLRA requires that a incarcerated offender pay costs in a mandamus action.

Section 506.366, RSMo 2000, states that "an offender seeking to bring a civil action or to appeal a judgment in a civil action without the prepayment of fees or security due to indigency shall submit a request to the court to proceed without the prepayment of fees." In matters of statutory interpretation, this Court has repeatedly held that "the primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning." Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 251 (Mo. banc 2003); Budding v. SSM Healthcare System, 19 S.W.3d 678, 680 (Mo. banc 2000). In its plain and ordinary meaning, §506.366 thus applies, on its face, to offenders bringing civil lawsuits. Mandamus proceedings are civil actions.

Supreme Court Rule 94.02. Relator Francis, an incarcerated offender, wishes to prosecute a petition for writ of mandamus, a civil lawsuit. The PLRA thus applies, on its face, to relator Francis' petition for writ of mandamus.

This Court has consistently applied the PLRA to petitions for writs of mandamus filed by inmates in the Department of Corrections. *See, for example,* State ex rel. Dearinger v. Livingston County Circuit Clerk, no. SC85607, order of Nov. 3, 2003 (Mo. banc); State ex rel. Alzawed v. Syler, no. SC85519, order of Sept. 16, 2003 (Mo. banc); State ex rel. Lee v. Sweeney, no. SC85577, order of Sept. 22, 2003 (Mo. banc) (case dismissed on Oct. 22, 2003 for failure to pay filing fee). Thus, requiring a filing fee in this case would be both proper and in accordance with this Court's actions in prior cases.

III. Relator Francis is not entitled to proceed in either this mandamus action of the underlying habeas corpus action without paying a filing fee based on his representation by the Missouri State Public Defender because the Office of the State Public Defender lacks authority to represent relator and also does not meet the statutory criteria for a "legal aid society" or a similar organization.

Relator alleges that §514.040.3, RSMo 2000, prohibits respondent from charging relator a filing fee in the underlying habeas action because the Office of the Public Defender is representing relator. Relator further argues that he should be allowed to file in this mandamus action without prepayment of fees and costs because he is indigent and representend by the public defender.

A. The Public Defender lacks authority to represent relator

Section 600.042.4, RSMo 2000, does not provide for the OSPD to represent persons in a state habeas corpus proceeding. Section 600.042.4 provides that the OSPD provide representation to any eligible person:

> **(1) Who is detained or charged with a felony, including appeals from a conviction in such a case; (2) Who is detained or charged with a misdemeanor which will probably result in confinement in the county jail upon conviction, including appeals from a conviction in such a case; (3) Who is detained or charged with a violation of probation or parole; (4) Who has been taken into custody pursuant to section 632.489, RSMo,**

including appeals from a determination that the person is a sexually violent predator, notwithstanding any provisions of law to the contrary; (5) For whom the federal constitution or the state constitution requires the appointment of counsel; and (6) For whom, in a case in which he faces a loss or deprivation of liberty, any law of this state requires the appointment of counsel.

OSPD relied on this lack of authority in obtaining a writ of prohibition from the this Court that prohibited the Randolph County Circuit Court from appointing the OSPD to represent inmates filing petitions for writ of habeas corpus. *See* State ex rel. Marshall v. Blaeuer, 709 S.W.2d 111 (Mo. banc 1986). If the OSPD argued in Marshall that it did not have to represent inmates filing state habeas petitions, surely the OSPD is not arguing here that they have the authority to do so. The OSPD either has the mandate and authority to represent state habeas corpus relators or they do not. Under this Court's decision in Marshall, the OSPD does not have the authority or duty to represent state habeas relators.

The OPSD further does not have the statutory authority to represent relator because there is no right to counsel in habeas corpus cases contained in either §600.042, RSMo 2000, as discussed previously, or under the federal or State Constitutions. Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S.Ct. 1990, 1993, 95 L.Ed.2d 539 (1987) (no right to counsel in collateral attacks on a conviction

or sentence); State v. White, 873 S.W.2d 590, 598 (Mo. banc 1994) (same); State v. Chambers, 891 S.W.2d 93, 113 (Mo. banc 1994) (same). Thus, state habeas relators have no right to counsel under the United States Constitution, the Missouri Constitution, or §600.042.4, RSMo 2000. Section 600.042.3, RSMo 2000, limits the public defender's office to representing persons "entitled to counsel under this chapter or otherwise so entitled under the laws of the United States or of the State of Missouri." Therefore, due to the lack of statutory authority, the OSPD is not properly representing relator Francis.

B. The Office of the State Public Defender is not a legal aid society or similar organization

Even if the OSPD were properly representing relator, relator still could not proceed with his state habeas corpus petition without the payment of filing fees. Section 514.040.3, RSMo 2000, governs this point and states as follows:

> **Where a party is represented in a civil action by a legal aid society or a legal services or other nonprofit organization funded in whole or substantial part by moneys appropriated by the general assembly of the state of Missouri, which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working on behalf of or under the auspices of such society, all costs and expenses related to the prosecution of the suit may be waived without the necessity of a motion**

and court approval, provided that a determination has been made by such society or organization that such party is unable to pay the costs, fees and expenses necessary to prosecute or defend the action, and that a certification that such determination has been made is filed with the clerk of the court.

Therefore, in order for a relator to be excused from paying costs under §514.040.3, a "legal aid society" or similar group must represent the relator. In this case, the Office of the State Public Defender is not a "legal aid society" or similar group within the meaning of the statutory language.

The definition of precisely what a legal aid society is not provided for in Missouri statutes and has not been addressed by Missouri courts. However, history and statutes from other jurisdictions show that a "legal aid society" is a group that provides civil legal assistance to indigent clients. ***See generally*** **Alan W. Houseman, Civil Legal Assistance for Low-income Persons: Looking Back and Looking Forward, 29 Fordham Urb. L.J. 1213, 1213-1221 (2002) (detailing history of legal aid societies). Legal aid societies began in 1876 with the foundation of the Legal Aid Society of New York in order to provide civil legal assistance to indigents, and the federal government began providing legal aid funds through the Legal Services Program in 1965. Houseman, supra, at 1213, 1217-18. The United States Congress instituted the Legal Services Corporation**

in 1974 in order to provide funding for "legal services in noncriminal proceedings." *See* 42 U.S.C. §§2996, 2996(b) (2003). Legal aid societies thus appear, from their inception, to have participated solely in *civil*, noncriminal lawsuits on behalf of indigent people, not collateral challenges to a conviction.

In the only statutory definition of "legal aid society" that counsel for respondent could locate, the Ohio Legislature defined legal aid societies as follows:

> **(A) "Legal aid society" means a nonprofit corporation that satisfies all of the following:**
>
> **(1) It is chartered to provide general legal services to the poor, it is incorporated and operated exclusively in this state, its primary purpose or function is to provide civil legal services, without charge, to indigents, and, in addition to providing civil legal services to indigents, it may provide legal training or legal technical assistance to other legal aid societies in this state.(2) It has a board of trustees, a majority of its board of trustees are attorneys, and at least one-third of its board of trustees, when selected, are eligible to receive legal services from the legal aid society.**
>
> **(3) It receives funding from the legal services corporation or otherwise provides civil legal services to indigents.**

Ohio Rev. Code Ann. §120.51 (West 2003). The Ohio statute thus is in accordance with the history of legal aid societies: legal aid societies provide general legal representation to indigent persons solely in civil cases not challenging a criminal conviction or sentence.

A close look at legal aid societies and legal service groups in Missouri also shows the character of groups that constitute a "legal aid society." For example, Legal Services of Eastern Missouri provides assistance to indigents in consumer law, elder law, employment law, housing law, immigration law, family law, and public benefits law. *See* http://www.lsem.org/about.htm[6]. Gateway Legal Services, Inc., located in St. Louis, is committed to "helping the poor and disabled." *See* http://www.gatewaylegal.com. Legal aid firms in other states provide similar services. *See, for example*, http://www.legal-aid.com ("We provide free, civil legal services to low-income persons and seniors who live in Orange County, California and southeast Los Angeles County"); http://www.law.emory.edu/alas ("The Atlanta Legal Aid Society has represented Atlanta's poor in civil legal cases since 1924. Our work helps our clients deal with some of life's most basic needs -- a safe home, enough food to eat, a decent

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[6]All websites were visited on August 4, 2003, and respondent has paper copies of the web pages mentioned above.

education, protection against fraud, and personal safety"); http://www.legalaidsociety.org/goal.html ("The Legal Aid Society of Santa Clara County (LAS) is a non-profit corporation founded in 1960 to provide free, civil legal services for those low-income persons unable to obtain access to the judicial system through other avenues."); http://www.svlas.org ("[Southwest Virginia Legal Aid Society] is a law firm organized as a not-for-profit corporation. We provide free legal service regarding civil matters to income eligible persons.").

The sole exception to this rule is the Legal Aid Society of New York, which functions, by contract with New York City, as the principal public defender in Manhattan, Brooklyn, Queens, and the Bronx. Chester A. Mirsky, The Political Economy and Indigent Defense: New York City, 1917-1998, 1997 Ann.Surv.Am. L. 891, 908; http://www.legal-aid.org/SupportDocumentIndex.htm?docid=25&catid=45. However, New York does not have a centralized state public defender system, but instead allows for each county to set up a public defender system for that county. N.Y. County Law §716 (McKinney 2003). New York City has opted not to set up a public defender system but has contracted with the Legal Aid Society of New York. Mirsky, *supra* at 908. Therefore, the Legal Aid Society of New York functions as two separate

divisions that share a common name: one part is the public defender service, and the other is a traditional legal aid society.

The overwhelming majority of legal aid societies thus are private law practices set up as not-for-profit corporations in order to provide civil, noncriminal legal advice in elder law, consumer fraud law, housing law, and similar issues to indigent persons. Legal aid societies thus advocate for indigent persons in civil cases that do not involve challenges to criminal convictions and sentences.

Application of the historical definition of "legal aid society" to the Office of the State Public Defender shows that the Office of the State Public Defender ("OSPD") does not fit into the mold of a "legal aid society" or a similar group. First, under Missouri statute, the OSPD is an "independent department of the judicial branch of state government." §600.019.1, RSMo 2000. The OSPD thus is not set up as a not-for-profit corporation, as are most legal aid societies. Second, in contrast with legal aid societies, which are private law firms, the OSPD is a governmental entity. Third, legal aid societies were created to provide representation in civil cases dealing with housing, family law, disability law, and elder law, not cases challenging criminal convictions. The OSPD was created specifically to give legal representation to indigent criminal defendants in cases where counsel is constitutionally required. §600.042.4, RSMo 2000.

The OSPD does not provide representation to indigent people in civil litigation involving housing law, elder law, disability law, or similar issues. Therefore, the OSPD is not a "legal aid society" in the usual and customary sense of the term.

Section 514.040.3, RSMo 2000, requires that a legal aid society or equivalent group represent a plaintiff in order for the plaintiff to be excused from paying costs. As shown, the OSPD is not a "legal aid society" in the common usage of the term of art. Therefore, relator Francis cannot satisfy the requirements of §514.040.3, and his second claim for mandamus relief must fail.

CONCLUSION

For the above-mentioned reasons, respondent prays that this Court deny the petition for writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains _____ words, excluding the cover and this certification, as determined by WordPerfect 9 software; that the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using McAfee Anti-virus software, and is virus-free; and that a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of _____, 2003, to:

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Respondent's Appendix

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28 U.S.C. §1915--Proceedings in forma pauperis

(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect,

as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of-- (A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection

(b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate judge in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e)(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or

(B) the action or appeal--(i) is frivolous or malicious;(ii) fails to state a claim on which relief may be granted; or(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.(2)(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which

relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

28 U.S.C. §2241--Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of

any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. §2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine

under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

28 U.S.C. §2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

§514.040, RSMo 2000. Plaintiff may sue as pauper, when--counsel assigned by court security for costs in civil actions by confined offenders--waiver

1. Except as provided in subsection 3 of this section, if any court shall, before or after the commencement of any suit pending before it, be satisfied that the plaintiff is a poor person, and unable to prosecute his or her suit, and pay all or any portion of the costs and expenses thereof, such court may, in its discretion, permit him or her to commence and prosecute his or her action as a poor person, and thereupon such poor person shall have all necessary process and proceedings as in other cases, without fees, tax or charge as the court determines the person cannot pay; and the court may assign to such person counsel, who, as well as all other officers of the court, shall perform their duties in such suit without fee or reward as the court may excuse; but if judgment is entered for the plaintiff, costs shall be recovered, which shall be collected for the use of the officers of the court.

2. In any civil action brought in a court of this state by any offender convicted of a crime who is confined in any state prison or correctional center, the court shall not reduce the amount required as security for costs upon filing such suit to an amount of less than ten dollars pursuant to this section. This subsection shall not apply to any action for which no sum as security for costs is required to be paid upon filing such suit.

3. Where a party is represented in a civil action by a legal aid society or a legal services or other nonprofit organization funded in whole or substantial part by moneys appropriated by the general assembly of the state of Missouri, which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working on behalf of or under the auspices of such society, all costs and expenses related to the prosecution of the suit may be waived without the necessity of a motion and court approval, provided that a determination has been made by such society or organization that such party is unable to pay the costs, fees and expenses necessary to prosecute or defend the action, and that a certification that such determination has been made is filed with the clerk of the court.

§506.366, RSMo 2000. Indigent offenders, proceedings without prepayment of fees

An offender seeking to bring a civil action or to appeal a judgment in a civil action without the prepayment of fees or security due to indigency shall submit a request to the court to proceed without the prepayment of fees. The request shall include a certified copy of the offender's correctional center account statement, which shall be provided by the department of corrections for the six-month period immediately preceding the filing of the petition or notice of appeal.

§600.042, RSMo 2000. Director's and defender's duties and powers--cases for which representation is authorized--promulgation of rules--discretionary powers of defender system--bar members appointment authorized

1. The director shall:

(1) Direct and supervise the work of the deputy directors and other state public defender office personnel appointed pursuant to this chapter; and he and the chief deputy director may participate in the trial and appeal of criminal actions at the request of the defender or upon order of the commission;

(2) Submit to the commission, between August fifteenth and September fifteenth of each year, a report which shall include all pertinent data on the operation of the state public defender system, the costs, projected needs, and recommendations for statutory changes. Prior to October fifteenth of each year, the commission shall submit such report along with such recommendations, comments, conclusions, or other pertinent information it chooses to make to the chief justice, the governor, and the general assembly. Such reports shall be a public record, shall be maintained in the office of the state public defender, and shall be otherwise distributed as the commission shall direct;(3) With the approval

of the commission, establish such divisions, facilities and offices and select such professional, technical and other personnel, including investigators, as he deems reasonably necessary for the efficient operation and discharge of the duties of the state public defender system under this chapter;(4) Administer and coordinate the operations of defender services and be responsible for the overall supervision of all personnel, offices, divisions and facilities of the state public defender system, except that the director shall have no authority to direct or control the legal defense provided by a defender to any person served by the state public defender system;(5) Develop programs and administer activities to achieve the purposes of this chapter;(6) Keep and maintain proper financial records with respect to the providing of all public defender services for use in the calculating of direct and indirect costs of any or all aspects of the operation of the state public defender system;(7) Supervise the training of all public defenders, assistant public defenders, deputy public defenders and other personnel and establish such training courses as shall be appropriate;(8) With approval of the commission, promulgate necessary rules, regulations and instructions consistent with this chapter defining the organization of his office and the responsibilities of public defenders, assistant public defenders, deputy public defenders and other personnel;(9) With the

approval of the commission, apply for and accept on behalf of the public defender system any funds which may be offered or which may become available from government grants, private gifts, donations or bequests or from any other source. Such moneys shall be deposited in the state general revenue fund;(10) Contract for legal services with private attorneys on a case-by-case basis and with assigned counsel as the commission deems necessary considering the needs of the area, for fees approved and established by the commission;(11) With the approval and on behalf of the commission, contract with private attorneys for the collection and enforcement of liens and other judgments owed to the state for services rendered by the state public defender system.

2. No rule or portion of a rule promulgated under the authority of this chapter shall become effective unless it has been promulgated pursuant to the provisions of section 536.024, RSMo.3. The director and defenders shall, within guidelines as established by the commission and as set forth in subsection 4 of this section, accept requests for legal services from eligible persons entitled to counsel under this chapter or otherwise so entitled under the constitution or laws of the United States or of the state of Missouri and provide such persons with legal services when, in the discretion of the

director or the defenders, such provision of legal services is appropriate.4. The director and defenders shall provide legal services to an eligible person:

(1) Who is detained or charged with a felony, including appeals from a conviction in such a case;(2) Who is detained or charged with a misdemeanor which will probably result in confinement in the county jail upon conviction, including appeals from a conviction in such a case;(3) Who is detained or charged with a violation of probation or parole;(4) Who has been taken into custody pursuant to section 632.489, RSMo, including appeals from a determination that the person is a sexually violent predator, notwithstanding any provisions of law to the contrary;(5) For whom the federal constitution or the state constitution requires the appointment of counsel; and(6) For whom, in a case in which he faces a loss or deprivation of liberty, any law of this state requires the appointment of counsel; however, the director and the defenders shall not be required to provide legal services to persons charged with violations of county or municipal ordinances.

5. The director may:(1) Delegate the legal representation of any person to any member of the state bar of Missouri;(2) Designate persons as representatives of the director for the purpose of making indigency determinations and assigning counsel.